cate a willingness to inflict injury, then even want of care on the plaintiff's part will not prevent recovery: *Railroad Co.* v. *Adams*, 26 Ind. 76; *Daley* v. *Railroad Co.*, 26 Conn. 597. Thus it is said that a man who is injured while walking on the track can recover, if the engineer saw him, but refused to slacken speed: *Railroad Co.* v. *Trainor*, 33 Md. 542. This, in another form, is the doctrine of proximate negligence. See *Butterfield* v. *Forester*, *supra*; *Trow* v. *Railroad Co.*, 24 Vt. 487. But a further advance has been made in some of the Western states, where it has been held that if the negligence of the defendant is gross, and that of the plaintiff slight in comparison, the latter may recover; although his want of care contributed to the accident. See the cases collected in *Railroad Co.* v. *Gretzen*, 46 Ill. 83. See also *Railroad Co.* v. *Hill*, 19 Ill. 499; *Railroad Co.* v. *Sweeney*, 52 Ill. 325; *Burham* v. *Railroad Co.*, 56 Mo. 338. The practical effect of this doctrine is to leave the mixed question of law and fact entirely to the jury, under the directions so general as to afford little guidance.

RICHARD S. HUNTER.

Supreme Court of Indiana.

TAMZAN TAYLOR *v.* LEVI S. STOCKWELL.

The regulation of remedies is within the power of the state legislatures, subject only to the restriction that as to past contracts they shall not be taken away entirely or so materially lessened as to impair the obligation of the contract itself.

States may exempt property from execution, or enlarge the amount so exempted, and such exemptions will, within the rule above given, be valid as applied to prior contracts.

By the law as existing when a debt was incurred, the realty of a husband was liable to sale upon execution, and the purchaser took the whole of it, subject to the contingency that if the wife of the debtor survived her husband, she might recover one-third of the land for her lifetime as dower. A statute was passed restricting sales upon execution to two-thirds of the land, and providing that upon such a sale the wife's title to the other third should vest at once as if her husband had then died. *Held*, that the statute was valid as against a creditor claiming under a prior contract.

ACTION to recover land. The following were the material facts in the cause: In February 1874, Alfred E. Taylor, the husband of the appellant, owned the land in dispute, which was worth less than $20,000. At that date, he, with others, executed a promissory note to the Howe Machine Company for $380. Afterwards, in September 1875, the payee of the note recovered a judgment thereon against the makers in the Bartholomew Circuit Court; an execution was duly issued upon the judgment, by virtue of which the land in controversy was levied upon and sold by the sheriff, as the property of said Alfred E. Taylor, and the appellee, Stockwell, held the sheriff's deed for the property made in pursuance of the sale.

The appellant claimed, under the Act of March 11th 1875, 1 Rev. Stat. 1876, p. 554, one-third of the land, and demanded that it be set off for her. The court below, however, decided against her, and thereupon she appealed to this court.

The first and second sections of the act referred to, are as follows:

Sect. 1. That in all cases of judicial sales of real property, in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interests of married women now become absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act and not otherwise. That when such inchoate right shall become vested, under the provisions of this act, such wife shall have the right to the immediate possession thereof, and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her.

Sect. 2. The provisions of this act shall not apply to sales of real estate upon judgments rendered prior to the taking effect of this act, nor to any sale of real property of the value of $20,000 and over, nor to the sale of such real property of the aggregate value of $20,000 and over, except to so much of such real property as shall not exceed in value the sum of $20,000.

The opinion of the court was delivered by

WORDEN, J.—It will be seen that the note upon which the judgment was rendered, was executed before the taking effect of the statute, though the judgment was rendered afterwards.

The statute doubtless, in terms, applies to such case, and entitles the appellant to one-third of the land, and to immediate partition thereof, if it be valid, as applied to judgments rendered upon contracts entered into by the husband before the taking effect thereof.

The appellee claims, and the court below decided, that the statute, as applied to sales on judgments rendered upon the contracts with the husband, entered into before the taking effect of the act, is void, as being in conflict with the provision in the federal and state constitution, forbidding the passage of any law impairing the obli-

gation of contracts: Const. U. S., art. 1, sect. 10; Const. Ind., Bill of Rights, sect. 24. The appellant contends, on the other hand, that the statute is constitutional and valid, as applied to such case. We have been furnished with able and exhaustive briefs upon the point by the counsel of the respective parties, which have greatly facilitated our labors in the examination of the question.

In order to a clear understanding of the question, it may be well to consider to what extent the creditor could have subjected the husband's land to the payment of the debt by the law existing at the time the contract was executed. This will aid us to comprehend more clearly the extent and character of the change made by the Act of 1875, and to determine the validity of the change as applied to contracts previously executed.

By the law, as it stood at the date of the contract, the creditor was entitled to have sold on execution the entire fee in the husband's lands for the payment of the debt. The purchaser, unless the land was redeemed as provided for, took the fee in the entire land, subject to the contingency that the wife should survive the husband, in which event he became divested of the title to one-third thereof in favor of the surviving wife. In the event that the husband survived the wife, the purchaser retained the fee to the entire land, and in either event he held the entire land during the joint lives of the husband and wife.

By the Act of 1875, the interest which the creditor could have sold on execution, and which the purchaser could acquire under the sale, was cut down to two-thirds of the land. The other third, to which the wife had only an inchoate right during coverture, to become consummate only on the contingency that she should survive her husband, is given immediately to the wife. By the law of the date of the contract the whole of the land could be sold, subject only to the wife's interest in one-third thereof contingent upon her survivorship.

By the law of 1875 only two-thirds of the land can be sold. In other words, the latter act exempts from sale on execution the third of the land to which the wife has an inchoate right during the marriage, to become consummate on the death of the husband, leaving her surviving, and vests her immediately with the consummate right thereto upon such sale of the other two-thirds.

It is sometimes difficult to determine satisfactorily whether an enactment merely affects the remedy without impairing the obliga-

tion of the contract, or whether by affecting the remedy it impairs that obligation.

The latest exposition of the subject to which our attention has been called is that contained in the case of *Edwards* v. *Kearzey*, 96 U. S. 595. In that case a debt was contracted in North Carolina at a time when only personal property to the value of $50, and real estate to the value of $500, were exempt from execution. Afterwards, by the constitution of that state of 1868, personal property to the amount of $500, and a homestead, not exceeding in value $1000, were exempted from execution. It was held that the increased exemption was invalid in respect to the prior contract, on the ground that it impaired the obligation thereof. The opinion of the court was pronounced by Mr. Justice SWAYNE, who, having considered the case at length, announced as the conclusion of the court the following proposition: "The remedy subsisting in a state when and where the contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is therefore void."

It may be noted that Mr. Justice HARLAN dissented, but the grounds of his dissent are not stated. Mr. Justice CLIFFORD delivered the following opinion, which we regard as valuable, and which we cannot condense without impairing its force. He said, "I concur in the judgment in this case upon the ground that the state law, passed subsequent to the time when the debt was contracted, so changed the nature and extent of the remedy for enforcing the payment of the same as it existed at the time, as materially to impair the rights and interests which the complaining party acquired by virtue of the contract merged in the judgment. Where an appropriate remedy exists for the enforcement of the contract at the time it was made, the state legislature cannot deprive the party of such remedy, nor can the legislature append to the right, such restrictions or conditions as to render its exercise ineffectual or unavailing. State legislatures may change existing remedies, and substitute others in their place, and if the new remedy is not unreasonable, will enable the party to enforce his rights without new and burdensome restrictions; the party is bound to pursue the new remedy, the rule being, that a state legislature may regulate at pleasure the modes of proceeding in relation to

past contracts as well as those made subsequent to the new reglation.

"Examples where the principle is universally accepted may be given to confirm the proposition. Statutes for abolition of imprisonment for debt are of that character, as so are statutes requiring instruments to be recorded, and statutes of limitation.

"All admit that imprisonments for debt may be abolished in respect to past contracts as well as future; and it is equally well settled that the time within which a claim or entry shall be barred may be shortened, without just complaint from any quarter. Statutes of the kind have often been passed; and it has never been held that such an alteration in such a statute impaired the obligation of a prior contract, unless the period allowed in the new law was so short and unreasonable as to amount to a substantial denial of the remedy to enforce the right: Angell Lim. (6th ed.) sect. 22; *Jackson* v. *Lamphire*, 3 Pet. 280.

"Beyond all doubt a state legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract. Authorities to that effect are numerous and decisive, and it is equally clear that a state legislature may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or certain articles of universal necessity in household furniture, shall, like wearing apparel, not be liable to attachment and execution for simple contract debts.

"Regulations of the description mentioned have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty, according to its own views of policy and humanity. Creditors, as well as debtors know that the power to adopt such regulations resides in every state to enable it to secure its citizens from unjust, merciless and oppressive litigation, and protect those without other means in their pursuits of labor, which are necessary to the well being and the very existence of every community. Examples of the kind were well known and universally approved, both before and since the constitution was adopted, and they are now to be found in the statutes of every state and territory within the boundaries of the United States; and it would be monstrous to hold that every time some small addition was made to such exemptions that the statute making it

impairs the obligation of every existing contract within the jurisdiction of the state passing the law.

"Mere remedy, it is agreed, may be altered at the will of the state legislature, if the alteration is not of a character to impair the obligation of the contract; and it is properly conceded that the alteration, though it be of the remedy, if it materially impairs the right of the party to enforce the contract, is equally within the constitutional inhibition. Difficulty would doubtless attend the effort to draw a line that would be applicable in all cases between legitimate alteration of the remedy, and provisions which, in the form of remedy, impair the right; nor is it necessary to make the attempt in this case, as the courts of all nations agree, and every civilized community will concede that laws exempting necessary wearing apparel, the implements of agriculture owned by the tiller of the soil, the tools of the mechanic, and certain articles or utensils of a household character, universally recognised as articles or utensils of necessity, are as much within the competency of a state legislature as laws regulating the limitation of actions, or laws abolishing imprisonment for debt: *Bronson* v. *Kinzie*, 1 How. 311."

Mr. Justice HUNT also delivered an opinion in the cause, in which he said: "I concur, not for the reason that any and every exemption made after entering into a contract is invalid, but that the amount here exempted is so large as seriously to impair the creditor's remedy for the collection of his debt. I think the law was correctly announced by Mr. Chief Justice TANEY, in *Bronson* v. *Kinzie*, 1 How. 311, when he said: A state 'may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like apparel, be not liable to execution on judgments.'

"The principle was laid down with the like accuracy by Judge DENIO, in *Morse* v. *Goold*, 11 N. Y. 281, where he says: 'There is no universal principle of law that every part of the property of the debtor is liable to be seized for the payment of a judgment against him. * * * The question is whether the law, which prevailed when the contract was made, has been so far changed that there does not remain a substantial and reasonable mode of enforcing it in the ordinary and regular course of justice."

It is thus seen that a state legislature may exempt property from execution, such as implements of agriculture, tools of the

mechanic, household furniture, &c., without impairing the obligation of contracts previously entered into, within the meaning of the constitution, or increase the amount of exemption after the making of a contract without working such results.

This goes upon the principle that the legislature may, in the pursuit of an enlightened public policy, and on principles of humanity, reserve to the debtor, as exempt from execution, the reasonable means of carrying on his business and occupation and a reasonable amount of the necessaries of life; and that this will not impair the obligation of previous contracts. The creditor knows when he lends his credit that the legislature may make such reasonable exemptions.

Such exemptions are held not to materially impair the obligation of contracts. In the language of Mr. Justice SWAYNE, in the case above cited: "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account."

The difficulty in such cases is to determine when the exemption is so great as to materially interfere with the remedy of the creditor, and when not. In the North Carolina case it was held that the exemption was so large as to thus interfere.

In the case of *Stephenson* v. *Osborne*, 41 Miss. 119, an act was passed exempting certain property from execution (the kind or value of which is not stated in the report of the case), and providing that upon the death of the husband it should descend to the widow. The law was held to be valid in respect to past contracts. The court said, among other things: "Laws exempting certain descriptions of property from liability to be taken in execution for debt, are founded in a wise and beneficent public policy. The state has an interest, that no portion of its citizens shall be reduced to a condition of destitution, so as to be prevented from prosecuting useful industrial employments, for which they are fitted; and that families shall not be deprived, by extravagance or misfortune, of the shelter and comforts necessary to health and activity. Nor is such legislation usually regarded, even when retrospective in its character, as obnoxious to constitutional objections. * * * The legislature exercises this power according to its own views of humanity and sound policy. But it is not without its proper limit, and it may be abused. Every party is entitled to an adequate and available remedy for the enforcement of his contracts, and any legislation

which impairs the value and benefit of the contract, though professing to act upon the remedy, would impair its obligation.

"It is not competent for the legislature, under color of an exemption law, so to obstruct the remedy upon contracts as to render it nugatory or impracticable. An abuse of the legislative discretion in this respect, would demand the interposition of the court. We do not undertake to intimate what would amount to such abuse; such a question would be one of great delicacy and difficulty."

Afterwards, in the case of *Lenly* v. *Phipps*, in the same state, 49 Miss. 790, where at the time of a contract, land not exceeding one hundred and sixty acres, of a value not exceeding $1500, was exempt from execution, and afterwards the legislature extended the exemption to two hundred and forty acres of land, regardless of its value, which might be worth $10,000 or $20,000, it was decided that the latter act was void as to the prior contract.

Having thus ascertained, as nearly as may be, the state of the laws on the constitutional question, we proceed to apply it to the case before us.

Previous to the Code of 1852, a widow was endowed of the lands of her deceased husband. By that code dower was abolished; and it was provided that one-third of the husband's lands, upon his decease, should descend to his widow, with a certain qualification as to amount where there were creditors.

It was also provided that upon the death of the husband, with the qualification above noticed, the surviving wife should be entitled to one-third of all the lands of which the husband was seised in fee-simple at any time during the marriage, in the conveyance of which she may not have joined in due form of law. See Statute of Descents, 1 R. S. 1876, p. 408, sect. 16, 17, 27.

It may be observed that in *Noel* v. *Ewing*, 9 Ind. 37, these enactments were held valid as applied to a marriage existing at the time the statute took effect; so far as the husband and wife, and the heirs or devisees of the husband were concerned we are not aware that any question has ever been made in this court as to the validity of the enactment giving the surviving wife one-third of the land so far as existing creditors of the husband were concerned.

The wife, then, as the law stood, before the act of 1875, had an inchoate right to one-third of the land of which the husband was seised in fee-simple, at any time during the marriage, and this right became consummate upon the death of the husband, unless she

had in the meantime joined in the conveyance thereof in due form of law. This third, in connection with the other two-thirds, might have been sold on execution against the husband, subject to the contingency of the wife's survivorship. But by the act of 1875, this third cannot be sold at all in that manner; and when the other two-thirds are thus sold, the hitherto inchoate right of the wife becomes at once consummate.

We are of opinion, in view of the principles and authorities hereinbefore noticed, that the legislature did not transcend its authority in thus cutting off, to the limited extent mentioned in the statute, as to the value of the property, the right to sell the third in which the wife had such inchoate interest. The act is not in our opinion open to the objection that it impairs the obligation of contracts. The provision is but a reasonable one for the protection of the wife and family against absolute want and destitution; and the land thus saved may be as imperatively needed as the farming implements of the farmer, or the tools of the mechanic. The same public policy and the same principles of humanity that would protect the one would also protect the other from sale. Then the remedy of the creditor is not in point of fact materially impaired. Where lands are sold, subject to the contingent interest of the wife, they seldom bring more than the value of the two-thirds, because this is all the purchaser is sure of getting. Before the purchaser receives his deed, which cannot be within a year after the sale, the husband may die, and the right of the wife becomes consummate. The purchaser seldom enhances his bid in consequence of the chance of obtaining the title to the third in which the wife has an inchoate interest, hence the remedy of the creditor is not materially impaired by withholding that third from sale altogether. And hence also, much injustice is frequently done, where the purchaser bids what he safely may as the value of two-thirds, but eventually obtains title, by his purchase, to the whole, the wife not surviving.

It follows from what has been said, that the court below erred in holding that the statute was void as to judgments rendered upon prior contracts.

The judgment below is reversed with costs, and the cause remanded for further proceedings in accordance with this opinion.